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05 UNITED STATES DISTRICT COURT
06 WESTERN DISTRICT OF WASHINGTON
07 AT SEATTLE

08 AT&T MOBILITY LLC, a Delaware)
09 limited liability corporation,) CASE NO. C10-468TSZ
10 Plaintiff,)
11 v.) ORDER
12 HOLADAY-PARKS-FABRICATORS,)
13 INC., a Washington corporation,)
14 Defendant,)
15 v.)
16 EVERGREEN POWER SYSTEMS,)
17 INC., a Washington corporation, et al.,)
18 Third-Party Defendants.)
19 _____)

20 This MATTER comes before the Court on Defendant Holaday-Parks-
21 Fabricators, Inc.’s (“Holaday-Parks”) Amended Motion for Leave to Amend Answer
22 and Third-Party Claims, docket no. 49. For the following reasons, the Court DENIES
Defendant’s motion to amend its answer and third-party claims.

01 I. **BACKGROUND**

02 On August 1, 2008, 16,000 gallons of diesel fuel overflowed from an
03 above-ground storage tank at AT&T's Bothell facility. Compl. ¶ 12 (docket no. 1).
04 On March 19, 2010, AT&T Mobility LLC ("AT&T") filed suit against Holaday-Parks,
05 the contractor who had installed the fuel system. On April 12, 2010, Holaday-Parks
06 filed a third-party complaint against Evergreen Power Systems, Inc. ("Evergreen"),
07 their electrical subcontractor, Source North America Corporation ("Ace Tanks"), which
08 supplied the fuel control system, and Phillips Pump, LLC, which manufactured the fuel
09 control system. Def. Answer and Third Party Compl. (docket no. 7). On June 29,
10 2010, the Court set a November 29, 2010 deadline to join parties. Minute Order
11 (docket no. 22). Although the Court later extended other pretrial deadlines, including
12 extending the deadline to amend pleadings to June 29, 2011, the Court has not extended
13 the deadline to join parties. Minute Order (docket no. 39).

15 Defendant Holaday-Parks now moves for leave to serve a third-party complaint
16 to Gerber Engineering ("Gerber"), a subcontractor to Evergreen. Holaday-Parks states
17 that it was not until May 23, 2011, when counsel for Ace Tanks forwarded to counsel for
18 Holaday-Parks a wiring diagram, that Holaday-Parks became aware that it was Gerber
19 who had specified the wiring for the fuel level sensor. Holaday-Parks argues that
20 Gerber should be joined because it believes AT&T will allege that the wiring specified
21 by Gerber was the wrong wiring. However, that diagram has been in the possession of
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01 Holaday-Parks since August 15, 2007, and was even produced by Holaday-Parks in
02 response to requests for production issued by Plaintiff AT&T in February, 2011. Decl.
03 of Seann C. Colgan ¶ 2, Ex. A. (docket no. 55). The wiring diagram was also produced
04 to Holaday-Parks in December 2010 as part of Evergreen’s production of 1400
05 documents. Am. Decl. of Jeffrey D. Laveson (“Laveson Decl.”) ¶ 8 (docket no. 50);
06 Decl. of Shilpa Bhatia (“Shipa Decl.”), Ex. 4 (docket no. 52-1).

07 **II. DISCUSSION**

08 **A. Standard of Review**

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10 Once a pretrial schedule has been set by the Court, it may only be modified “for
11 good cause” and with the judge’s consent. Fed. R. Civ. P. 16(b)(4). The “good cause”
12 standard primarily considers the diligence of the party seeking the amendment. The
13 district court may modify the pretrial schedule “if it cannot reasonably be met despite
14 the diligence of the party seeking the extension.” Johnson v. Mammoth Recreations,
15 Inc., 975 F.2d 604, 609 (9th Cir. 1992). Mistake or inadvertence of counsel is
16 insufficient to support a finding of good cause. Davis v. Washington, No. 04-5509,
17 2008 WL 701576, at *1 (W.D. Wash. Mar. 13, 2008). If good cause is shown, the
18 movant must show that the amendment is proper under Fed. R. Civ. P. 15. Although
19 leave to amend shall be freely given under Rule 15, “it may be denied if the proposed
20 amendment either lacks merit or would not serve any purpose because to grant it would
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01 be futile....” Universal Mortg. Co., Inc. v. Prudential Ins. Co., 799 F.2d 458, 459 (9th
02 Cir. 1986).

03 **B. Holaday-Parks Has Failed to Show Good Cause**

04 Holaday-Parks has proffered no legitimate excuse for why it has taken it almost
05 four years to interpret a document in its possession. It complains that over a half
06 million pages of documents needed to be reviewed, and it is only 20/20 hindsight that
07 shows the importance of the wiring diagram. Yet Holaday-Parks produced the same
08 wiring diagram, along with emails, meeting minutes, and other documents showing
09 Gerber’s role in the project, to the other parties during discovery. Shipa Decl. ¶ 5.
10 Holaday-Parks had numerous other missed opportunities to determine the diagram’s
11 importance. It could have spoken with its own employees who communicated with
12 Gerber during the project. It could have sent interrogatories or requests for production
13 to Evergreen. It could have deposed Evergreen’s employees. That it was only until
14 Holaday-Parks received the diagram as part of an email from Ace Tanks that
15 Holaday-Parks realized the importance of the diagram does not demonstrate diligence.
16 Laveson Decl. Ex. A. Accordingly, the Court finds that Holaday-Parks has failed to
17 demonstrate good cause for adding a party past the deadline.
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19 The Court also notes that Holaday-Parks will not be prejudiced by a refusal to
20 join Gerber, and that other parties would be prejudiced by adding a party at this late date.
21 The Court construes Evergreen’s statement that “it is not going to use Gerber
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01 Engineering's participation in the project as an empty chair" as stating that Evergreen
02 takes responsibility for the actions of its subcontractor Gerber and will not seek
03 indemnity from Gerber in this action. Evergreen Opp'n at 7 (docket no. 51).
04 Therefore it does not appear that Holaday-Parks will be prejudiced by Gerber's absence.
05 At the same time, allowing Gerber to be added as a party at this late juncture would
06 delay discovery and trial by months, which would prejudice the other parties.

07 **C. Granting Leave to Amend Would be Futile**

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09 Moreover, even if Holaday-Parks had acted diligently, it has no basis for a claim
10 against Gerber Engineering, and therefore the amendment is futile under Fed. R.
11 Civ. P. 15. Holaday-Parks is not in contractual privity with Gerber and concedes that it
12 has no legal basis to sue Gerber unless the Court allows it to advance a tort claim under
13 the recent Washington Supreme Court case, Affiliated FM Ins. Co. v. LTK Consulting
14 Services, Inc., 170 Wn.2d 442 (2010), because "[w]here, as here, there was no direct
15 contractual relationship, the general contractor would have no claim at all against the
16 design professional." Am. Mot. for Leave to Answer Third-Party Claims,
17 5 (docket no. 49). See also Reply, 2 (docket no. 57) ("Until the Washington Supreme
18 Court decided the Affiliated FM case, there was no legal basis for [Holaday-Parks] to
19 sue Gerber.").

20 Holaday-Parks argues that Affiliated now provides reason for it to amend its
21 third-party claims to advance a tort claim against Gerber Engineering. It does not.
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01 Before Affiliated was decided, Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist.
02 No. 1, held that in the context of a construction project, a general contractor could not
03 recover purely economic damages in tort from a design professional, and was limited to
04 those damages recoverable in contract. 124 Wn.2d 816, 833 (1994).¹ The court in
05 Affiliated did not overrule Berschauer/Phillips, rather it noted that “extending that case
06 to all classes of harm and all classes of people would be unjust.” Affiliated held for the
07 first time that an engineering contractor had a duty of reasonable care independent of its
08 contractual obligations. 170 Wn.2d at 451-54. The court in Affiliated then extended
09 this duty of care to a Seattle Monorail concessionaire who had a legally protected
10 interest in the Monorail, which was damaged by fire due to the engineering contractor’s
11 negligence, and who had claimed economic loss for lost business profits during the
12 monorail’s shutdown. Id. at 456-58. But unlike in Affiliated, Holaday-Parks is not
13 seeking its own damages; it seeks only indemnification for claims brought against it by
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21 ¹ Berschauer/Phillips involved a contractor who sought recovery of economic loss due to construction delays
22 caused by the architect, structural engineer, and the project inspector. The court reasoned that the contractor
should be barred from recovery in tort “to ensure that the allocation of risk and the determination of potential future
liability is based on what the parties bargained for in the contract.” Id. at 826.

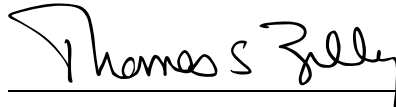
01 AT&T.² Nor does Holaday-Parks have a legally-protected interest in AT&T's
02 property.³ Affiliated is therefore inapplicable to Holaday-Parks, and does not save
03 Holaday-Parks from the futility of adding a party for whom it lacks a legal basis to sue.

04 **III. CONCLUSION**

05 For the foregoing reasons, the Court DENIES Defendant's motion to amend its
06 answer and third-party claims.

07 IT IS SO ORDERED.

08 DATED this 8th day of July, 2011.

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11 Thomas S. Zilly
12 United States District Judge
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20 ² Although Holaday-Parks captions its claims as "negligence," "indemnity," "breach of warranty," "breach of
21 contract," and "contribution," under each claim it only seeks indemnification. It does not claim damages of its
22 own. Am. Mot. for Leave to Answer Third-Party Claims, 19-22 (docket no. 49).

³ The Court leaves for another day the questions of how far the duty of care established by Affiliated extends and
whether that duty applies in the context of construction contracts, and holds only that where, as here, no tort
damages or legally-protected interests are alleged, Affiliated is inapplicable.